No. 08-1134

In The
Supreme Court of the United States

UNITED STUDENT AID FUNDS, INC.,

Petitioner,

v.

FRANCISCO J. ESPINOSA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CHAPTER THIRTEEN TRUSTEES AS *AMICUS CURIAE* SUPPORTING RESPONDENT

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

The National Association of Chapter Thirteen Trustees ("NACTT") is a non-profit, educational organization composed of consumer bankruptcy professionals.[1] Its membership represents a broad spectrum of participants in the consumer bankruptcy process including debtors' attorneys, creditors' representatives, and Standing Chapter 13 trustees. The NACTT's voting membership is composed of private trustees appointed by the U.S. Department of Justice, Executive Office of the U.S. Trustee, *see* 28 U.S.C. § 586, and in the federal judicial districts of North Carolina and Alabama by the judiciary. Approximately 98% of the Standing Chapter 13 trustees in the United States are voting members of the NACTT. Kevin Anderson, a Standing Chapter 13 Trustee for the District of Utah and current president of the NACTT, and the NACTT's Board of Directors have directly authorized Henry E. Hildebrand, III, Standing Chapter 13 Trustee for the Middle District of Tennessee, to prepare and submit this *amicus curiae* brief on the NACTT's behalf.

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[1] Pursuant to Supreme Court Rule 37.3(a), *amicus curiae* states that all parties have consented to the filing of this brief. Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for a party authored the brief in whole or in part and that neither counsel for a party nor any party made a monetary contribution intended to fund the preparation or submission of the brief. No person other than *amicus curiae*, its members, or its counsel made any such monetary contribution.

Historically, Congress and federal courts have observed that the more efficient and effective Chapter 13 programs have been conducted by Standing Chapter 13 trustees who exercise a broad range of responsibilities in both the design and effectuation of Chapter 13 plans. *Matter of Maddox*, 15 F.3d 1347, 1355 (5th Cir. 1994). A Chapter 13 trustee has a statutory responsibility to participate in the confirmation and administration of every Chapter 13 plan. *See* 11 U.S.C. § 1302. A Chapter 13 trustee, like bankruptcy trustees in general, is charged with a responsibility to the system and to maximize recoveries to general creditors. The trustee is empowered to assert claims, avoid preferences, collect property of the estate, and examine and object to creditors' claims in furtherance of the congressional goal of equitably distributing property of the estate to the creditors. *Maddox*, 15 F.3d at 1355; *In re Gustav Schaeter Company*, 103 F.2d 237 (6th Cir. 1939). The trustee represents the interests of all creditors by exercising various powers to ensure that the collection of the debtor's disposable income and disbursement of that money to creditors pursuant to a plan occurs according to the dictates of Congress as set forth in the Bankruptcy Code. *Maddox*, F.3d at 1355.

In consideration of the foregoing, Standing Chapter trustees are in a unique position to objectively argue the issues raised in this review. The *amicus* urges the adoption of the Ninth Circuit's ruling in *In re Espinosa*, 553 F.3d 1193 (9th Cir. 2008), that a final order confirming a Chapter 13 plan should not

be set aside due to the debtor's failure to comply with the procedures dictated by the Bankruptcy Rules. This position is necessary for effective and efficient administration of Chapter 13 cases. Trustees, more than most, rely on the finality of confirmation orders in the administration of cases and disbursement of funds to creditors. Trustees administer nearly $5 billion annually,[2] pursuant to hundreds of thousands of orders in thousands of cases.[3] If these orders are "void" any time the movant does not strictly comply with the notice rules, even when notice is provided, all of the actions of the trustees would be at risk.

The *amicus* asserts that the language of the Bankruptcy Code, its underlying legislative history, and decades of bankruptcy policy support the Ninth Circuit's ruling that a creditor with actual notice of a Chapter 13 Plan is not denied due process even though the creditor is not served with a complaint and summons, even where the impact of such works to discharge a student loan. The NACTT submits that

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[2] The Executive Office for U.S. Trustees disclosed that Chapter 13 trustees distributed $4,969,787,399 in FY 2008. Executive Office for U.S. Trustees, FY-2008 Chapter 13 Trustee Audited Annual Reports, *at* http://www.justice.gov/ust/eo/private_trustee/library/chapter13/docs/ch13ar08-AARpt.xls. Distributions from the states of Alabama and North Carolina were not included in this number.

[3] According to the administrative office of the U.S. Courts, 362,762 Chapter 13 cases were filed in the 2008 calendar year. Press Release, Admin. Office of the U.S. Courts, Bankruptcy Filings Up in Calendar Year 2008, *at* http://www.uscourts.gov/Press_Releases/2009/BankruptcyFilingsDec2008.cfm.

the Ninth Circuit's holding preserves efficient administration of Chapter 13 cases while recognizing the right and obligation imposed on parties to participate in the process. Trustees rely on 11 U.S.C. § 1327, which clearly articulates a sound policy: Confirmation Orders are binding on Chapter 13 debtors, and each creditor, whether or not the creditor is provided for by the Chapter 13 plan, and whether or not the creditor has objected to, accepted, or rejected the plan. To allow a creditor to challenge a confirmation order despite having received actual notice of the order months or years after a trustee has acted in reliance upon the order threatens the structure of the private trustee system.

The integrity and the efficient administration of the hundreds of thousands of Chapter 13 cases filed each year is dependent on this court's affirming the finality of the Confirmation Order free from collateral attack, even by a student loan creditor, where the creditor has received actual notice of a plan.

SUMMARY OF THE ARGUMENT

Under general principles of finality, a court order is binding, subject only to a stay pending appeal or other very limited exceptions. For example, the trial court may grant relief under Rule 60 of the Federal Rules of Civil Procedure if there is error that is not resolvable through appeal. The "finality" of orders

would have little meaning were orders left open to endless reconsideration by a court.

With respect to a Chapter 13 confirmation order, its binding effect rests not only on the general principles of finality, but also on section 1327(a) of the Bankruptcy Code. This statute buttresses the general principle of finality by making a Chapter 13 confirmation order binding on "the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted, or has rejected the plan." 11 U.S.C. § 1327(a).

The efficiency and effectiveness of the Chapter 13 bankruptcy process depends on the finality of Chapter 13 confirmation orders. The trustee is charged with administering Chapter 13 cases pursuant to confirmed plans. This involves, among other things, disbursing funds "as soon as is practicable" after confirmation. 11 U.S.C. § 1326(a)(2). Frequently, claims in Chapter 13 cases are relatively small, and a confirmed plan may provide for no distribution to a class of claims, such as unsecured claims. Creditors often choose not to incur the expense of attending meetings of creditors or objecting to confirmation of plans because the cost of doing so outweighs any possible benefit. For this reason, among others, unlike Chapter 11, Chapter 13 is premised on notice and opportunity to object; voting for and acceptance of a plan by impaired creditors is not a condition of confirmation as in 11 U.S.C. § 1129(a). Were creditor voting a requirement, it would be impossible to

confirm many Chapter 13 plans. For this reason, 11 U.S.C. § 1325(a) provides that a plan *shall* be confirmed if the plan meets the requirements specified therein. If creditors have received notice of their opportunity to object together with either the plan or a summary of the plan, and no objection is timely filed, "the court may determine that [a] plan has been proposed in good faith and not by any means forbidden by law without receiving any evidence on such issues." Fed. R. Bankr. P. 2002(b), 3015(d), 3015(f). Congress crafted Chapter 13 and related Rules to ensure, with the oversight of a Chapter 13 trustee, that plans may be confirmed and issues resolved with finality even where no creditor directly participates in the process.

The linchpin of Chapter 13 is the requirement that the trustee and every creditor whose claim may be affected by a confirmed plan receive adequate notice of the contents of a debtor's plan and an opportunity to object to confirmation. In this case, United Student Aid Funds, Inc. ("Petitioner") was a party to the Chapter 13 bankruptcy proceeding. Petitioner received actual notice of the bankruptcy filing, of the contents of the debtor's Chapter 13 plan (including particularly the proposed treatment of Petitioner's claim), notice of its opportunity to object to confirmation, and notice of confirmation (and thereby, notice of the deadline for appealing the order confirming plan). J.A. 34. Petitioner did not object to the plan, nor did it appeal the order confirming plan.

The order is, therefore, binding under both 11 U.S.C. § 1327(a) and the general principles of finality.

An assertion that the bankruptcy court erred in applying the Bankruptcy Code or the Federal Rules of Bankruptcy Procedure might have provided grounds for a timely appeal of confirmation of the plan, but should not provide a basis for invalidating a final order. A party to the bankruptcy proceeding, provided with notice and an opportunity to object and be heard throughout the life of a case, cannot, years later, arbitrarily challenge a Chapter 13 confirmation order, particularly after the plan has been consummated and creditors paid in accordance with the confirmed plan.

The position of the *amicus* does *not* lie in the argument that the bankruptcy court was correct in confirming Mr. Espinosa's Chapter 13 plan; in fact, an objection raised by a creditor, the trustee, or sua sponte by the court should have resulted in a denial of confirmation of the plan. The *amicus*' position lies in the sanctity – the necessity – of orders being final. More than most parties to the bankruptcy process, trustees must act – as fiduciaries administering trusts – based upon the reliability and finality of the orders guiding and governing their actions.

If the principles of *constitutional* due process were violated, the *amicus* concedes that a basis for relief would be present, but the flaws in this case did not result in a denial of constitutional due process. This Court said it best: due process requires "notice

reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). Petitioner received notice sufficient to satisfy this standard. Petitioner, in fact, received actual notice, which factually resolves the issue. Pet. Br. at 5. Any argument that due process was denied is negated by the actual receipt of notice.

ARGUMENT

I. A confirmation order is binding under the general principles of finality of orders and the specific statutory finality of confirmation orders under 11 U.S.C. § 1327(a).

Petitioner's primary arguments challenge the finality of the confirmation order on the grounds that the order was not obtained in a manner precisely consistent with the Bankruptcy Code and the Federal Rules of Bankruptcy Procedure. The relevant question, however, is not whether the order resulted from an error of law or procedure. Rather, it is whether Petitioner is entitled to relief from the effect of the confirmation order, an order that is binding under the general principles of finality of court orders and the specific statutory finality of confirmation orders under 11 U.S.C. § 1327(a).

Petitioner argues that, because the entry of the confirmation order involved errors of law and procedure, the bankruptcy court acted outside of its "authority" such that the confirmation order was void. Pet. Br. at 31-33. Under this argument, however, any error of law or procedure would render an order void; in effect, no legal argument could be waived or forfeited, and confidence in the finality of court orders would become a dead letter. Clearly, this theory cannot stand.

Orders that confirm Chapter 13 plans, when final, dictate the conduct of all parties to the case, and such parties act with, and depend upon, the respect accorded to such orders. Chapter 13 trustees disburse nearly $5 billion per year in reliance upon such orders. Executive Office for U.S. Trustees, *supra*, note 2. If such orders were always subject to reevaluation for compliance with law and procedural rules that do not rise to constitutional requirements, the uncertainty would cripple the Chapter 13 process.

A. This Court has recognized the importance of finality of court orders.

This Court has repeatedly emphasized the importance of the finality of judicial determinations. Although most of the Court's pronouncements to this effect have reflected upon the importance of res judicata, the principles are no less vital in this case.

Petitioner may be correct that a Rule 60 motion (adopted generally as Rule 9024 of the Federal Rules

of Bankruptcy Procedure) does not implicate res judicata because it is a direct rather than a collateral attack on the order,[4] Pet. Br. at 36, but the "practical necessity served by that rule [res judicata]" is nonetheless applicable here. *Travelers Indem. Co. v. Bailey*, 129 S. Ct. 2195, 2206 (2009). *See* discussion *infra* part I.E.1. (noting the functional similarity

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[4] Although Petitioner argues res judicata does not apply, it also argues that the elements of res judicata are not satisfied. One of Petitioner's arguments is that the elements are not satisfied because the matter was not adjudicated on the merits. Pet. Br. at 37-38. Petitioner, however, participated in the proceeding by filing a proof of claim. J.A. 35. It is not even clear, therefore, that the matter was not adjudicated. Simply because an *issue* was not raised in adjudicating a *claim* does not mean that the adjudication of the *claim* is not res judicata. In any event, an actual trial on the claim is not strictly necessary. "A judgment of a court having jurisdiction of the parties and of the subject matter operates as res judicata, in the absence of fraud or collusion, even if obtained upon a default." *Morris v. Jones*, 329 U.S. 545, 550-51 (1947) (quoting *Riehle v. Margolies*, 279 U.S. 218, 225 (1929)); *see also* 18 Moore's Federal Practice § 130.30[3][d] ("A judgment by default may be the basis for claim preclusion to the same extent as any other valid, final judgment.").

Petitioner's other argument is that it did not receive adequate notice, and that the lack of such notice deprived it of a full and fair opportunity to litigate the claim. Pet. Br. at 38-40. This argument is essentially the same as Petitioner's due process argument. As explained in part II, *infra*, the notice Petitioner received was adequate to apprise Petitioner of the proceeding and provide a full and fair opportunity to litigate the claim. Petitioner's complaint, therefore, is not that the notice was fundamentally inadequate to inform Petitioner of the proceeding, but rather that the notice was deficient under the rules.

between the "direct" attack in this case and a traditional collateral attack). A number of decisions, in fact, describe a Rule 60 motion as a "collateral attack." *See, e.g.*, *Bell v. Eastman Kodak Co.*, 214 F.3d 798, 800-01 (7th Cir. 2000) ("The rule [Rule 60(b)] governs collateral attack on a final judgment rendered by a federal district court in a civil case; and collateral attack, especially in civil cases, is disfavored because of the social interest in expedition and finality in litigation."). Whether or not this designation is correct, Petitioner's motion in this case presents the same issues of finality that many collateral attacks present. *See id.* at 801 ("A collateral attack on a final judgment [under Rule 60(b)] is not a permissible substitute for appealing the judgment within the time, standardly 30 days, for appealing the judgment of a federal district court. The ground for setting aside a judgment under Rule 60(b) must be something that could not have been used to obtain a reversal by means of a direct appeal." (citations omitted)); *see also* 12 Moore's Federal Practice § 60.22[2] (3d ed. 2009) ("[F]inality of judgments is of great importance and . . . final judgments should not be disturbed lightly. . . . Rule 60(b) is not a substitute for a timely appeal.").

"'[T]he very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination,'" is found only if orders are accorded respect. *Nevada v. United States*, 463 U.S. 110, 129 (1983) (quoting *S. Pac. R.R. Co. v. United*

States, 168 U.S. 1, 49 (1897)). The enforcement of an order is "'essential to the maintenance of social order; for, the aid of judicial tribunals would not be invoked for the vindication of rights of person and property, if . . . conclusiveness did not attend the judgments of such tribunals.'" *Id.* "Courts to determine the rights of parties are an integral part of our system of government. It is just as important that there should be a place to end as that there should be a place to begin litigation." *Stoll v. Gottlieb*, 305 U.S. 165, 172 (1938).

The finality of court judgments applies in this case in the same way it applies in collateral attacks on all court orders. The extent of the finality of an order may not be precisely the same in an attack under Rule 60(b)(4) as in a collateral attack in another court, but in both contexts the exceptions to the binding effect of court orders are limited for the same underlying reasons: parties must be able to rely on court orders and leaving the orders perpetually open to second-guessing (whether by another court or by the same court) would prevent such reliance.

B. The finality of the Chapter 13 confirmation order is based not only on general principles of finality but also on specific statutory provisions.

The finality of orders confirming Chapter 13 plans depends not only on general principles but also on finality accorded by statute. The Bankruptcy Code

provides that "[t]he provisions of a confirmed plan bind the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted, or has rejected the plan." 11 U.S.C. § 1327(a). The Code also imposes strict limits on actions to revoke confirmation orders. *See* 11 U.S.C. § 1330(a); *see also* Br. of *Amicus Curiae* Professor Rafael I. Pardo.

Broadly speaking, "[t]he purpose of section 1327(a) is the same as the purpose served by the general doctrine of res judicata." 8 Collier on Bankruptcy ¶ 1327.02 (15th ed. rev. 2006). But the two are not identical, and the statutory finality that arises from section 1327 applies independently of res judicata principles. "When the enforcement of a confirmation order or discharge order is at issue in the bankruptcy court that issued those orders, res judicata is not in play; rather, the binding effect of confirmation under § 1327(a) is enforced after the discharge through the discharge injunction. . . ." Hon. Keith M. Lundin & Hon. William H. Brown, *From* Szostek *to* Mansaray-Ruffin*: Why* Espinosa *is Right*, 6-2 Norton Bankr. L. Advisor 13 (June 2009).

> It is a well-established principle of bankruptcy law that a party with adequate notice of a bankruptcy proceeding cannot ordinarily attack a confirmed plan. The reason for this is simple and mirrors the general justification for res judicata principles – after the affected parties have an opportunity to

> present their arguments and claims, it is cumbersome and inefficient to allow those same parties to revisit or recharacterize the identical problems in a subsequent proceeding.

In re Harvey, 213 F.3d 318, 321 (7th Cir. 2000) (citations omitted).[5]

Because the finality of confirmation orders is statutory, it is not limited to the circumstances in which res judicata applies. Regardless of whether res judicata requires actual litigation (based on an "on the merits" element), *see supra* note 4, the finality under section 1327(a) does not require litigation. "The provisions of a confirmed plan bind . . . each creditor, . . . *whether or not such creditor has objected to, has accepted, or has rejected the plan*." 11 U.S.C. § 1327(a) (emphasis added).

Section 1330 also reflects the importance of the finality of confirmation orders, limiting the time within which a court may revoke a confirmation order procured by fraud to 180 days after entry of the order. 11 U.S.C. § 1330(a). This provision has been held to

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[5] While some courts have refused to accord finality to confirmation orders that contain provisions contrary to the Code, here it is rule-created procedures that were violated. Clearly the court has the jurisdiction and the power to find that a student loan is subject to discharge. The method by which the court makes the determination is dictated only by procedural rules. A determination inconsistent with the rule-created procedure does not represent a statutory or constitutional defect.

bar the challenge to a confirmation order other than a challenge based on fraud that is brought within 180 days of entry of the order.[6] *See, e.g.*, *Branchburg Plaza Assoc., L.P. v. Fesq (In re Fesq)*, 153 F.3d 113, 120 (3d Cir. 1998) ("Revoking a confirmation order is a measure that upsets the legitimate expectations of both debtors and creditors. Interpreting Section 1330(a) as a limiting provision permits such disruption in only a very narrow category of egregious cases. [The alternative] approach, on the other hand, would open the courtroom doors to a large number of post-confirmation attacks. Those added challenges could seriously undermine the integrity of the Chapter 13 proceedings, as dissatisfied creditors could seek to drag out the litigation by bringing themselves under Rule 60(b)'s broader rubric in an attempt to extract concessions."). Even if section 1330 does not entirely preclude other actions to revoke a confirmation order, Rule 9024 of the Federal Rules of Bankruptcy Procedure appears to impose the 180-day limit from section 1330 on any complaint to revoke a confirmation order. *See* Br. of *Amicus Curiae* Professor Rafael I. Pardo at 12-14. Both section 1330(a) and Rule 9024, therefore, reflect what Professor Pardo correctly describes as a congressional policy of giving an "accelerated degree of finality" to confirmation orders. *Id.* at 18.

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[6] Section 1328(e) provides a similar limitation on revocation of a discharge order. *See* 11 U.S.C. § 1328(e).

C. The finality of the Chapter 13 confirmation order is vital to the Chapter 13 system.

In the Chapter 13 bankruptcy system, the finality of the confirmation order is a necessity. The confirmation order sets terms on which trustees, creditors, and debtors rely. The small size of many of the claims in Chapter 13 cases may limit, as a practical matter, direct participation in the confirmation proceedings. The system, accordingly, was designed to operate, and operates efficiently, on notice and opportunity to object. For it to function effectively, objections raised by any party can be effectively presented, but, once approved, confirmation orders must be binding on all parties with notice.

"Confirmation is the bright line in the life of a Chapter 13 case at which all the important rights of creditors and responsibilities of the debtor are defined and after which all rights and remedies must be determined with reference to the plan." Keith M. Lundin, Chapter 13 Bankruptcy, § 228.1 (2000 & Supp. 2004). Because of the function of the confirmation proceeding in the Chapter 13 process, the finality of the confirmation order is vital to the effectiveness and efficiency of the system. *See id.* ("[I]n some circuits debtors and creditors can't count on § 1327 to produce finality of rights and responsibilities in Chapter 13 cases with great enough certainty to ensure a reliable and efficient Chapter 13 program. The uncertainty that results from judicial limitations on the effects of confirmation under

§ 1327 increases the cost of Chapter 13 for debtors and creditors and distorts the natural selection of chapters by consumer bankruptcy attorneys."); *see also Educ. Credit Mgmt. Corp. v. Robinson (In re Robinson)*, 293 B.R. 59, 65 (Bankr. D. Or. 2002) (recognizing "Congress' acknowledgement that confirmation orders are indeed different than other orders").

> [A] confirmed plan acts more or less like a court-approved contract or consent decree that binds both the debtor and all the creditors. Bringing the various creditors' interests to the table once is difficult enough; permitting one of the creditors to launch a later attack on a confirmed plan would destroy the balance of interests created in the initial proceedings.

In re Harvey, 213 F.3d 318, 321 (7th Cir. 2000). "There must be finality to a confirmation order so that all parties may rely upon it without concern that actions which they may thereafter take could be upset because of a later change or revocation of the order." *Mersmann v. Educ. Credit Mgmt. Corp. (In re Mersmann)*, 505 F.3d 1033, 1047 (10th Cir. 2007) (quoting 4 Collier on Bankruptcy ¶ 523.14[1] (15th ed. rev. 2006)). "This is the objective of the confirmation process, to achieve finality." *In re Gellington*, 363 B.R. 497 (Bankr. N.D. Tex. 2007); *see also Adair v. Sherman*, 230 F.3d 890 (7th Cir. 2000) (referring to the "finality that bankruptcy confirmation is intended to provide"). As the Third Circuit recognized, "creditors would not participate in reorganization if

they could not feel that the plan was final," and "it would be unjust and unfair to those who had accepted and acted upon a reorganization plan if the court were thereafter to reopen the plan and change the conditions which constitute the basis of its earlier acceptance." *In re Szostek*, 886 F.2d 1405, 1409 (3d Cir. 1989) (quoting *In re Penn Cent. Transp. Co.*, 771 F.2d 762 (3d Cir. 1985)).[7] Similarly:

> It would hardly serve the purposes for which the federal bankruptcy laws were intended to permit a dissatisfied creditor to withhold its opinion of the practicality and fairness of a debtor's plan until after that plan has been completed. At such a late point in time, a meaningful modification of the plan is difficult, if not impossible, and the objecting creditor is in a position to circumvent the protective shield provided debtors under Chapter 13.

In re Gregory, 19 B.R. 668, 670 (B.A.P. 9th Cir. 1982).

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[7] The Third Circuit later clarified that "while *Szostek* does note the importance of finality, it recognizes that the policy of finality must yield to the principle that a plan cannot violate a mandatory provision of the Code." *SLW Capital, LLC v. Mansaray-Ruffin*, 530 F.3d 230, 238 (2008). The court went on to find that an adversary proceeding is mandatory in order to invalidate a lien, based on principles of due process (not a mandatory Code provision). As explained in part II, *infra*, the determination of dischargeability in this case did not violate due process.

The finality of the confirmation order is imperative to the proper functioning of the Chapter 13 system. The bankruptcy system is designed to facilitate an organized administration of a debtor's estate. Doing so requires a determination of the rights and responsibilities of debtors and creditors, accomplished in a Chapter 13 case largely through the confirmation order. If a creditor with constitutionally adequate notice can ignore the proceedings and, years later, raise standard objections, this system cannot function effectively.

D. The ramifications of denying the finality of a confirmation order based on inconsistencies with the rules of procedure are potentially severe.

The heart of Petitioner's argument for relief from the confirmation order is that Mr. Espinosa did not establish the dischargeability of his student loan debt through an adversary proceeding, as required by the Federal Rules of Bankruptcy Procedure. *See* Pet. Br. at 25-26. A holding that a confirmation order is void because of noncompliance with the Rules of Procedure has potentially severe ramifications.

Plan confirmation procedures are often combined with associated motions, especially motions to value collateral for purposes of claim splitting.[8] Although

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[8] The valuation of collateral can lead to the bifurcation of a claim into a secured claim in the amount of the value of the

(Continued on following page)

the Bankruptcy Code permits the determination of the value of collateral to be made in conjunction with the plan confirmation proceedings, 11 U.S.C. § 506(a), the Rules require heightened notice: the valuation determination is a motion proceeding, *see* Fed. R. Bankr. P. 3012, and Rule 9014(b) requires motions initiating contested matters to be served as prescribed in Rule 7004, the rule governing the service of adversary proceedings, *see* Fed. R. Bankr. P. 9014(b). If a failure to comply with the detailed procedural requirements of Rule 7004 renders the associated orders void, not just voidable, even where actual notice is effected, then many confirmed plans – and actions taken upon those plans – will be at risk.

Further, Petitioner's argument – that the effect of confirmation of the plan should be ignored because the questionable provision was not effected by an adversary proceeding – ignores the reality that there is no difference in the way that a plan or an adversary is delivered – by first class mail. While one mailed document may say "summons," one may say "motion," and one may say "plan," the title of the

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collateral and an unsecured claim for the remainder. 11 U.S.C. § 506(a). Such "claim splitting" allows a debtor to "require the lienholder to accept the present value of the property in full satisfaction of the lien even if the total debt exceeds the value of the property." Keith M. Lundin, Chapter 13 Bankruptcy, § 105.1 (2000 & Supp. 2004). Most courts apply the same process to junior liens that are wholly unsecured to strip the lien entirely. *See* William L. Norton, Norton Bankruptcy Law and Practice 3d, § 149:7 (database updated July 2009).

document received cannot be the basis for a denial of process.

As the officer principally charged with implementing a confirmed Chapter 13 plan, the trustee must distribute trust funds pursuant to the plan. 11 U.S.C. § 1326(a)(2). Petitioner argues that having to actually read the notices provided would impose a heavy burden. Pet Br. at 48. Failing to accord finality to the order because it did not result from a proceeding designated an "adversary proceeding" or marked with the word "summons" or not mailed "to the attention of an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process" is unwarranted; such flaws do not merit a wholesale undoing of orders. Tens of thousands of orders relating to plan confirmation, claims allowance and classification, and lien avoidance are entered each month in bankruptcy cases – particularly Chapter 13 cases. If such orders are subject to being "void," as argued by Petitioner, the entire credibility and certainty of consumer bankruptcy cases would be jeopardized. Certainly the risk of a loss of finality is a far greater price than expecting a party to a case to read the notice provided.

E. Petitioner's statutory argument is inconsistent with the finality of the confirmation order because the argument implies that any error of law or procedure provides grounds for relief.

Finality of court orders and the binding effect of confirmation under section 1327(a) require that an error in a confirmation order, whether procedural or substantive, may stand when a party fails to object. That possibility is at the heart of the concept of finality. *Cf. United States v. Moser*, 266 U.S. 236, 242 (1924) ("[A] fact, question, or right distinctly adjudged in the original action cannot be disputed in a subsequent action even though the determination was reached upon an erroneous view or by an erroneous application of the law. That would be to affirm the principle in respect of the thing adjudged but, at the same time, deny it all efficacy by sustaining a challenge to the grounds upon which the judgment was based."). Petitioner, therefore, must do more than just establish a legal or procedural error in the bankruptcy court's confirmation order. It must establish some exception to the general and statutory finality of the confirmation order. Most of Petitioner's brief, however, addresses only the former issue, arguing that the confirmation order is inconsistent with the Bankruptcy Code and Rules.

1. An order is not void simply because it involves an error of law or procedure.

Under Rule 60 of the Federal Rules of Civil Procedure, made applicable by Rule 9024 of the Federal Rules of Bankruptcy Procedure, a court "may relieve a party or its legal representative from a final judgment, order, or proceeding" for several specified reasons, including that "the judgment is void." Fed. R. Civ. P. 60(b)(4); Fed. R. Bankr. P. 9024. Relying on this rule, Petitioner argues that the discharge of student loan debt through the confirmation order and subsequent discharge order is "void" because the action is "beyond the court's authority." Pet. Br. at 13.

Petitioner argues that the confirmation order violated the statute and the rules in several respects, but the arguments all suffer from the same flaw. They treat an order that is inconsistent with the statute, or even the rules of procedure, as beyond the court's authority. This argument significantly overstates the circumstances in which an order is "void."

> "[A] judgment is void, and therefore subject to relief under Rule 60(b)(4), *only* if the court that rendered it lacked jurisdiction or in circumstances in which the court's action amounts to a plain usurpation of power constituting a violation of due process." (emphasis in original). A judgment is not void simply because it is wrongly decided.

12 Moore's Federal Practice § 60.44[1][a] (3d ed. 2009) (footnotes omitted) (quoting *United States v. Boch*

Oldsmobile, Inc., 909 F.2d 657, 661 (1st Cir. 1990)). Such a rule is required to confer legitimacy and justify reliance upon the Chapter 13 process. Otherwise, almost any error would render a confirmation order void: taking Petitioner's argument at face value, a court would not have had the "authority" to enter an order that was based on an error of law or procedure. This theory would eliminate the finality of orders approving Chapter 13 plans, orders that are entered and are rendered final by statute.

Even when the "authority" that a court exceeds is as fundamental as subject matter jurisdiction, the principles of finality significantly limit the ability to revisit a final order. "In the context of Rule 60(b)(4), a lack of subject-matter jurisdiction for the purpose of making a judgment void means a court's lack of jurisdiction over an entire category of cases, not whether a court makes a proper or improper determination of subject-matter jurisdiction in a particular case." 12 Moore's Federal Practice § 60.44[2][a] (3d ed. 2009).

In *Travelers Indemnity Co. v. Bailey*, 129 S. Ct. 2195 (2009), in circumstances similar to the circumstances here, the Court held that "the need for finality forbids a court called upon to enforce a final order to 'tunnel back . . . for the purpose of reassessing prior jurisdiction de novo'" *Travelers*, 129 S. Ct. at 2206 (quoting *In re Optical Technologies, Inc.*, 425 F.3d 1294, 1308 (11th Cir. 2005)). *Travelers* involved a collateral attack, but its holding is instructive in this case, even if Petitioner's attack on

the confirmation order is properly labeled a "direct" attack. The distinction between the collateral attack in *Travelers* and the "direct" attack under Rule 60(b) in this case is largely superficial.

In *Travelers*, the insurer sought enforcement of a bankruptcy court's prior orders, requesting that the court enjoin state court actions that Travelers contended violated the prior orders, described as the "1986 Orders." *Travelers*, 129 S. Ct. at 2200. The court of appeals reversed the bankruptcy court's order clarifying its 1986 Orders, holding that the bankruptcy court had exceeded its jurisdiction in the 1986 Orders. *Id.* at 2202. This Court reversed, holding that "once the 1986 Orders became final on direct review (whether or not proper exercises of bankruptcy court jurisdiction and power), they became res judicata." *Id.* at 2205.

In this case, the issue arose in a substantially similar manner. Mr. Espinosa moved to reopen his bankruptcy case and sought enforcement of the discharge injunction. Resp. Br. at 6-7. As in *Travelers*, therefore, the issue arose when a party to a court's prior orders sought to enforce the prior orders in the same court – in *Travelers*, the prior orders were the 1986 Orders; in this case, the prior orders were the confirmation order and the discharge order.[9] And, as

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[9] The original discharge order excepted Mr. Espinosa's student loan debts from discharge, but only because of a clerical error, later corrected by the bankruptcy court. J.A. 48.

in *Travellers*, the challenge to the prior orders was based on the alleged invalidity of the prior orders – in *Travelers*, invalidity because the court exceeded its subject matter jurisdiction; in this case, invalidity because the court exceeded its "authority." The difference between these asserted bases for holding the prior orders void is marginal, at best. In fact, Petitioner's original argument before the bankruptcy court was the same as the basis asserted in *Travelers*, that the bankruptcy court had lacked subject matter jurisdiction.[10] Resp. Br. at 6.

In short, the "collateral" attack on the 1986 Orders in *Travelers* was functionally the same as the Rule 60 motion in this case. In both instances, the attack was raised as a response to an action to enforce prior bankruptcy court orders, and in both instances, the proceedings to enforce the prior orders were before the court that issued the orders. Designating an attack on a confirmation order a "direct" attack should not provide an end-run around the vital finality of the confirmation order, especially when the attack is (like the collateral attack in *Travelers*) based on grounds that could have been raised in the original

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[10] Petitioner also alleges invalidity on the grounds that it did not receive notice sufficient to satisfy constitutional due process. *Travelers* did not hold that the necessity of finality would trump such invalidity. *Travelers*, 129 S. Ct. at 2207. As explained in part II, *infra*, however, Petitioner was not denied constitutional due process.

proceeding but were instead raised only long after the fact.

Petitioner argues that the Ninth Circuit's ruling contradicts the self-executing nature of section 523(a)(8) and, similarly, that it improperly shifts the burden of raising the issue of dischargeability from the debtor to the creditor. (The United States, as *amicus*, asserts similar arguments, *see* Br. for the United States at 13-23, but does not mention Rule 60 at all, leaving somewhat unclear what the asserted basis is for relief from the final confirmation order.) These arguments, however, do not establish that the court acted beyond its authority. A bankruptcy court has authority to determine dischargeability of student loan debts, *see* 11 U.S.C. § 523(a)(8), and to confirm a Chapter 13 plan, *see* 11 U.S.C. § 1325. That fact distinguishes this case from the cases cited by Petitioner, like *United States ex rel. Wilson v. Walker*, 109 U.S. 258 (1883), in which the court entered a decree "not within the powers granted to the court." *Id.* at 266. In this case, the bankruptcy court may have erred in its *exercise* of its authority, but it did not act without authority, such that its actions were void. An error in exercising that authority is not relevant at this stage of the proceedings. Such an error could have been raised as an objection to the plan and, if necessary, in an appeal from the confirmation order. But because of

the vital importance of the finality of confirmation orders, the objection cannot be raised now.[11]

The same reasoning applies to Petitioner's arguments concerning sections 1322(b)(11) or 1325(a)(1). Pet. Br. at 27-30. Those sections do not define the court's "authority," such that an inconsistency with the provisions would render the order void. Extending Petitioner's argument, in fact, reveals its impracticability. If sections 1322(b)(11) and 1325(a)(1) limited a court's "authority" to confirming plans that comply with the provisions of the Bankruptcy Code, then any confirmation order that involved an erroneous application of the Code would be void. Such a rule would leave confirmation orders perpetually subject to attack. No statutory argument would ever be waived or forfeited.

The bankruptcy court's action in this case was not beyond the court's authority under the Bankruptcy Code. Section 523(a) does not preclude a discharge of student loan obligations; it simply limits

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[11] Justices Breyer and Ginsburg have both recognized a similar point in the context of motions under Rule 60(b)(5). *See Horne v. Flores*, 129 S. Ct. 2579, 2618 (2009) (Breyer, J., dissenting) ("A party cannot use a Rule 60(b)(5) motion as a substitute for an appeal, say, by attacking the legal reasoning underlying the original judgment or by trying to show that the facts, as they were originally, did not then justify the order's issuance."); *Agostini v. Felton*, 521 U.S. 203, 257 (1997) (Ginsburg, J., dissenting) ("[R]elitigation of the legal or factual claims underlying the original judgment is not permitted in a Rule 60(b) motion or an appeal therefrom").

the discharge to cases in which "excepting such debt from discharge . . . would impose an undue hardship on the debtor and the debtor's dependents." 11 U.S.C. § 523(a)(8). It is the Rule, not the statute, that requires the dischargeability determination to be in an adversary proceeding. *See* Fed. R. Bankr. P. 7001(6). Rules govern procedural matters, not the court's "authority." *See* Fed. R. Civ. P. 1001 ("The Bankruptcy Rules and Forms govern *procedure* in cases under title 11 of the United States Code." (emphasis added)); *cf. Kontrick v. Ryan*, 540 U.S. 443, 454 (2004) (holding that filing deadlines in the Bankruptcy Rules are "claim-processing rules that do not delineate what cases bankruptcy courts are competent to adjudicate").

A bankruptcy court has authority under the statute to determine dischargeability of student loan debts. It is not a credible argument that the bankruptcy court did something outside its authority. At most, the court erred in the exercise of its authority. Such an error provides grounds for objection and appeal but does not invalidate the order.

2. Respecting the finality of the confirmation order does not require approval of the practice of providing for discharge of nondischargeable debts through Chapter 13 plans.

Though the demand for finality of confirmation orders requires the orders to be binding even when

they are not consistent with the Bankruptcy Code or the Rules of Procedure, it does not require approval of practices that create such inconsistencies. *Amicus* here does not contend that the bankruptcy court should have confirmed Mr. Espinosa's plan, only that confirmation created a final order that was binding subject only to limited exceptions.

The Court need not undermine the vital finality of the confirmation order in an effort to address abuse of the confirmation process. Courts have alternative means of dealing with such issues. This Court, in *Taylor v. Freeland & Kronz*, 503 U.S. 638 (1992), recognized a similar point. Rejecting the argument that the need to prevent abusive claims of exemptions required allowing a trustee to raise untimely objections, the Court noted that "[d]ebtors and their attorneys face penalties under various provisions for engaging in improper conduct in bankruptcy proceedings." *Id.* at 644. Some courts, in fact, have announced policies of treating attempts to discharge student loan debt through Chapter 13 plan provisions as sanctionable conduct. *See, e.g.*, *In re Gardner*, 287 B.R. 822, 826 (D. Kan. 2002); *In re Hensley*, 249 B.R. 318, 322-23 (Bankr. W.D. Okla. 2000); *see also In re Lemons*, 285 B.R. 327, 332-33 (Bankr. W.D. Okla. 2002) (imposing sanctions); *In re Evans*, 242 B.R. 407, 413 (Bankr. S.D. Ohio 1999) (ordering debtor's attorney to show cause why inclusion of student loan addendum did not violate Rule 9011(b)). Whether or not such sanctions are merited – the Ninth Circuit concluded that the resolution of the issue through the

plan confirmation process was efficient, and that courts "have no business standing in the way," *Espinosa v. United Student Aid Funds, Inc.*, 553 F.3d 1193, 1205 (9th Cir. 2008) – the availability of the sanctions diminishes the need to invalidate confirmation orders as a means of addressing the issue.

II. The determination of dischargeability in this case did not deny Petitioner constitutional due process.

Petitioner argues that an order confirming a Chapter 13 plan, containing the questionable provision, denied it due process. Pet. Br. at 51-58. Petitioner, however, was not denied due process of law. Petitioner received actual notice of the bankruptcy proceeding and notice of the specific plan terms, Pet. Br. at 5, and acted upon that notice by filing a proof of claim in response to the plan, *id.* at 7. As a party with notice, Petitioner had an opportunity to be heard. Had it raised an objection to the debtor's plan, Petitioner easily could have obtained a hearing on the dischargeability of the debt. *Amicus* agrees that, had Petitioner raised such an objection, the debtor's plan, almost certainly, would not have been (and should not have been) confirmed.

Due process requires "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314

(1950). Petitioner received notice sufficient to satisfy the *Mullane* standard: Petitioner acknowledges that "[a] copy of Mr. Espinosa's plan was mailed to (and received by) USA Funds" at the address used to receive loan payments, Pet. Br. at 5, and that Petitioner received additional notice related to the incompatibility of its claim with the plan, *id.* at 8.

Petitioner, moreover, received actual notice. It was clearly apprised of the proceeding and participated in the payments by filing a proof of claim. Actual notice satisfies constitutional due process. The question of fundamental fairness that *Mullane* and its progeny address is whether a proceeding should be binding on a party in the absence of assurances that the party is actually apprised of the proceeding. *See Mullane*, 339 U.S. at 319 ("The reasonableness, and hence the constitutional validity of, any chosen method may be defended on the ground that it is, in itself, reasonably certain to inform those affected, or, where conditions do not reasonably permit such notice, that the form chosen is not substantially less likely to bring home notice than other of the feasible and customary substitutes." (citations omitted)); *Greene v. Lindsey*, 456 U.S. 444, 449 (1982) ("[W]e have allowed judicial proceedings to be prosecuted in some situations on the basis of procedures that do not carry with them the same certainty of actual notice that inheres in personal service. But we have also clearly recognized that [in such cases] the Due Process Clause does prescribe a constitutional minimum. . . ."). When a party *is* actually apprised of the

action, the question of the reasonableness of the notice as a means of apprising the party is resolved.

Petitioner is arguing for more than just notice, or even actual notice. It is arguing that constitutional due process requires precise compliance with the Federal Rules of Bankruptcy Procedure. This argument gives the force of constitutional due process to the Rules of Bankruptcy Procedure. These are two different tests, however, and the consequences of failing to satisfy them differ. Due process establishes basic requirements for a deprivation of life, liberty, or property by adjudication to be binding. These requirements are fundamental, and they do not vary with changes to the Rules of Bankruptcy Procedure. The fundamental nature of due process requirements means that a proceeding that fails to satisfy the requirements is invalid. The Rules of Bankruptcy Procedure, however, are not so fundamental. They provide rights to the parties that, in order to be enforced, must be enforced in a timely manner. The significance of a failure to comply with the Rules of Bankruptcy Procedure is different than the significance of a failure to provide due process of law.

This Court recognized the distinction between the requirements of due process and the requirements of the Rules of Bankruptcy Procedure in *Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440 (2003), noting that "[t]he text of § 523(a)(8) does not require a summons, and absent Rule 7001(6) a debtor could proceed by motion . . . which would raise no constitutional concern." *Id.* at 453. In other words,

the Court recognized the obvious point that due process establishes fundamental requirements, onto which the Rules of Bankruptcy Procedure may add additional requirements. Such additional requirements, however, do not have the force of the fundamental requirements of due process. The Court in *Hood* had no cause to note the distinction, but Petitioner cannot seriously contest it.

Petitioner is complaining about rule noncompliance, not constitutional due process failures. The Rules of Bankruptcy Procedure, not the Constitution, require an adversary proceeding, initiated by a complaint and summons, served in a specified manner. *Hood* clearly states that the adversary proceeding, with complaint and summons, is not a constitutional requirement. The fact that Petitioner did not receive a complaint and summons, served in accordance with Rule 7004, therefore, does not establish a due process violation; at most, it establishes a rule violation. The time for objecting to rule violations, however, has long since passed.

Petitioner received notice that apprised it of the proceeding that determined the dischargeability of a portion of Mr. Espinosa's debt. The proceeding, therefore, satisfied the fundamental requirements of constitutional due process, the basic requirements necessary to make an adjudication binding.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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